No. 79-282

In the Supreme Court of the United States

OCTOBER TERM, 1979

IN THE MATTER OF ALADDIN HOTEL CORPORATION,
PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
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Petitioner contends (Pet. 7-11) that an order of the district court denying petitioner's motion to quash two grand jury subpoenas *duces tecum* is a final decision appealable under 28 U.S.C. 1291.

1. In May 1979, a grand jury sitting in the United States District Court for the Eastern District of Missouri subpoenaed various records of petitioner in connection with an investigation of official corruption in St. Louis, Missouri. Contending that compliance would be overly burdensome, petitioner moved to quash the subpoenas. The district court modified one of the two subpoenas duces tecum in question and ordered petitioner to comply with the subpoenas as modified (Pet. 3-5; Pet. App. A-1).

On appeal, the government moved to dismiss the appeal for lack of jurisdiction. Relying on *United States* v. *Ryan*, 402 U.S. 530 (1971), the court of appeals summarily granted the government's motion and dismissed the appeal (Pet. App. A-1, A-2).

2. 28 U.S.C. 1291 reflects a strong congressional policy against piecemeal review, particularly in the context of criminal proceedings. See, *e.g.*, *United States* v. *MacDonald*, 435 U.S. 850, 853-857 (1978); *United States* v. *Nixon*, 418 U.S. 683, 690 (1974); *DiBella* v. *United States*, 369 U.S. 121, 126 (1962). Accordingly, this Court has repeatedly concluded that the denial of a motion to quash a subpoena is not ordinarily an appealable order. *E.g.*, *United States* v. *Nixon*, *supra*, 418 U.S. at 690-691; *United States* v. *Ryan*, 402 U.S. 530 (1971); *Cobbledick* v. *United States*, 309 U.S. 323 (1940); *Alexander* v. *United States*, 201 U.S. 117 (1906). Consequently, a person who seeks to resist the production of evidence and wishes to establish his right to appellate review of an order compelling production of documents must generally refuse to comply with that order and suffer the consequences of his contempt. See *United States* v. *Ryan*, *supra*, 402 U.S. at 532-533; *Cobbledick* v. *United States*, *supra*, 309 U.S. at 328. This case presents no exceptional circumstances warranting departure from this well settled rule.

Petitioner suggests (Pet. 7-8) that, because it is not the subject of the grand jury investigation, the Court's decision in *Perlman* v. *United States*, 247 U.S. 7 (1918), somehow controls this case. But *Perlman* involved the appeal of a third party intervenor who was not the party to whom the subpoena was addressed. Since such a person cannot depend on the subpoenaed party's willingness to suffer the consequences of a contempt citation in order to vindicate his rights, this Court permitted the appeal, noting that otherwise Perlman would be "powerless to avert the mischief of the order." *Id.* at 13. See also *In re Faltico*, 561 F. 2d 109, 110 n.2 (8th Cir. 1977); *United States* v. *Doe*, 455 F. 2d 753, 756-757 (1st Cir.), vacated on other grounds, *Gravel* v. *United States*, 408 U.S. 606, 608-609 n.1 (1972). Here, however, petitioner is the party named in the subpoena, and therefore it is not "powerless to avert the mischief of the order." There is, in sum, nothing to distinguish this case from the consistent line of authority barring appeal from an order enforcing a subpoena.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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